Supreme Court of the United States

OCTOBER TERM, 1968

No. 646

JAMES F. O'CALLAHAN,

Petitioner,

—vs.—

J. J. PARKER, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

No. 756

JAMES F. O'CALLAHAN, PETITIONER

vs.

J. J. PARKER, Warden, United States Penitentiary Lewisburg, Pennsylvania, and the DEPARTMENT OF THE ARMY, United States Army, Washington, D. C., RESPONDENTS

For Petitioner:

Pro Se

For Respondent:

Bernard J. Brown, Esq., U. S. Attorney
Harry A. Nagle, Esq., Asst. U. S. Attorney
Abraham Memrow, Lt. Col., JAG, Dept. of Army

Counsel:

Bruce E. Stevenson, Maj., JAG, Dept. of Army.

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 2 mailed	Clerk	4/ 7/66	O'Callahan	5.00	
J.S. 3 mailed	Marshal	4/11/66	CD 39		5.00
		9/21/66	O'Callahan	5.00	
Violation	Docket fee		Notice Appl.		
Title					
Sec.					
JS5 4/ 7/66					
JS6 8/12/66					

HABEAS CORPUS DOCKET

DATE		PROCEEDINGS
1966		
April 7	1.	Petition for writ of habeas corpus.
April 15	2.	Order (F) Rule granted, returnable May 19, 1966.
		Copy to petitioner, respondent, and US Attorney.
April 18	3.	Motion for a writ to show cause.
April 19	4.	Order, Motion for writ to show cause denied.
April 29	5.	Motion for a Speedy Hearing.
May 5	6.	Respondent's Return to Rule to Show Cause.
May 5	7.	Memorandum of Points and Authorities.
May 9	8.	Certificate of Service by Mail.
May 19	9.	Petitioner's Traverse to Respondents' Answers to Rule to Show Cause, and Motion for assignment of counsel.
Aug. 12	10.	Memorandum and Order; Motion to dismiss granted, petition dismissed, motion for assignment of counsel denied. Copies to petitioner, Warden Parker, JAG, and US Attorney.
Aug. 18	11.	Copy order CCA (Maris) Leave granted to file petition for writ of mandamus, Further ordered petition denied. Order dated Aug. 17.
Aug. 25	12.	Motion for a rehearing, and Petitioner's Supporting Memorandum.
Aug. 26	13.	Order denying motion for rehearing.
		Copy to petitioner, respondent and US Attorney.
Sept. 16	14.	Notice of Appeal. Copy mailed clerk CCA.

Certified from the record, Sept. 21, 1966,
T. H. Campion, Clerk, per R. P. Bower, Deputy Clerk.

[SEAL]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

No. 756 HC

JAMES F. O'CALLAHAN, PETITIONER

v.

WARDEN, United States Penitentiary,
Lewisburg, Pennsylvania

DEPARTMENT OF THE ARMY, United States Army,
Washington, D. C., RESPONDENTS

PETITION FOR A WRIT OF HABEAS CORPUS—
Dated March 28, 1966 and Filed April 7, 1966

Respectfully represents your petitioner, James F. O'Callahan, *pro se*, as follows:

I

The petitioner resides in the United States Penitentiary, Lewisburg, Pennsylvania within the judicial district of this court.

II

The respondents are the WARDEN, United States Penitentiary, Lewisburg, Pennsylvania and the said institution and official is located within the judicial district of this court, as Warden, he is responsible for the custody and control of all prisoners in said institution and governs and manages them pursuant to their respective sentences have been performed, or until they are otherwise discharged in due course of law; and, the DEPARTMENT OF THE ARMY, United States Army, Washington, D. C. whose military courts-martial sentence to confinement for ten years rendered by General Courts-Martial #393590 on October 11, 1956 at Fort Shafter, Oahu, Territory of Hawaii is the authority by which the respondent, WARDEN, United States Penitentiary, Lewisburg, Pennsylvania holds your petitioner in physical confinement.

III

On October 11, 1956 petitioner was put to trial by a General Courts-Martial at Fort Shafter, Oahu, Territory of Hawaii for civil substantive crimes of Assault with intent to rape; Housebreaking with intent to commit rape; and, Attempted rape in violation of Sections 880, 930, and 934, Title 10, United States Code. The aforesaid criminal acts were charged to have been committed by your petitioner on or about July 20, 1956 at the Reef Hotel, Waikiki Beach, Honolulu, Oahu, Territory of Hawaii. On October 11, 1956 the General Courts-Martial returned a verdict of guilty to all charges and specifications and petitioner was on October 11, 1956 sentenced to be dishonorable discharged, to forfeit all pay due and to become due and, to be confined at hard labor for ten years. Petitioner is presently incarcerated pursuant to said sentence and, is unlawfully restrained and confined for the reasons set forth below.

IV

Petitioner has exhausted all available military remedies. On March 1, 1957 the United States Court of Military Appeals entered an order affirming petitioner's conviction and sentence; and, any further proceedings judicially or administrative, if otherwise available, would be to no avail for the military courts and authorities are so biased and prejudiced against petitioner that he will be denied relief in any event.

V

Petitioner is unable to produce the transcript, exhibits, documents, and records arising from his trial and appeal because he does not have possession of or access to the same; but, he asserts that such transcript, exhibits, documents and records are available, for they are presently within the care, custody, and control of the respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D.C. Petitioner's attack upon the unlawful nature of his restraint relates to each and every one of the proceedings which have heretofore been held in the military courts and a full consideration of the issues here-

in raised requires the examination of substantially all of the aforesaid records.

VI

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D.C. violated petitioner's Federal Constitutional Rights to a fair and impartial trial and more specifically those Federal Constitutional Rights guaranteed to him by Article III and Amendment VI, United States Constitution which relates to trial by jury in the following manner:

Petitioner was on or about the evening of July 20, 1956 arrested by two uniformed police officers of the Honolulu, Hawaii, Police Department at Waikiki Beach on suspicion of having broken into an apartment dwelling in the Reef Hotel and assaulting its occupant. Petitioner was transported in handcuffs from the point of arrest on Waikiki Beach to the Reef Hotel by the Honolulu Police Officers to the apartment dwelling in question in the Reef Hotel for purposes of establishing identification. Petitioner was subsequently transported in custody from the Reef Hotel to the Honolulu Police Station and was booked on charges unknown to petitioner. Petitioner was held in confinement at the Honolulu Police Station that evening and was subjected to extensive questioning by relays of uniformed police officers concerning the break and assault at the Reef Hotel; and, Petitioner denied all knowledge of said crimes and loudly proclaimed his innocence. The following morning after the normal day shift of the Detective Division of the Police Department reported for work, Petitioner was again handcuffed and transported to the Detective Division Headquarters for further questioning by detective officers. At some unknown time on the second day of custody petitioner was surrendered by the civil police to the Hawaiian Armed Services Police because petitioner was a Sergeant in the United States Army.

Upon being taken into custody by the Hawaiian Armed Services Police petitioner was transported, in handcuffs, under arrest, to the Hawaiian Armed Services Police Station on Ala Moana Blvd., Honolulu, Hawaii and again questioned about the break and assault charge. Petitioner

was again subsequently handcuffed and transported to the Headquarters, Criminal Investigation Division, United States Army, Pacific, located at Fort Shafter, Oahu, Hawaii and again subjected to questioning by these agents. During this latest period of questioning Petitioner was informed by these agents that as a career man (awaiting a commission) I should know that the military couldn't prosecute me for whatever happened in Honolulu and that in the meantime I was putting a lot of heat on them (the military) because I had gotten arrested by the civil police. They went on to state that due to the influence of the hotel people and money elements behind the scenes I should give them a confession so as to eliminate all the trouble and it could then die down. Additionally, should the civil police decide to come and get me again for these crimes then, the military would be in a position to adequately protect me. After being assured by them that this would not result in any military charges against me nor would it effect my career or commission I then gave them a confession to "take the heat off and protect the army."

After receiving the confession Petitioner was again transported in handcuffs to the Post Stockade, Schofield Barracks, Oahu, Hawaii and ordered held in confinement "incommunicado" . . . no visits from anyone. Some days later Petitioner was served with court-martial charges charging the so called Honolulu offenses and then assigned counsel to defend him.

VII

Article III, Section 2 of the Constitution of the United States provides that "The trial of all crimes, except in cases of impeachment, shall be by jury." The V Amendment provides that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." The VI Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ." The exception for cases arising in the land and naval forces, though appearing only in the V Amendment, has been deemed to apply

by implication to the right to petit jury trial granted by the Sixth Amendment. *Ex parte Milligan*, 4 Wallace (18 U.S.) 2, 123, 138-139 (1866) *Ex parte Quirin*, 317 U.S. 1, 40, but there has been no decision of the question here presented, of whether an offense committed while the perpetrator is off-base and off-duty, having no relation to the military other than what he was at the time, a member thereof, is a case "arising in the land and naval forces" or is otherwise excepted from the guarantee of jury trial.

The key to the solution appears to have been given by the Supreme Court in *Ex parte Quirin*, 317 U.S. 1 (1942). The Fifth and Sixth Amendments "did not enlarge the right to jury trial as established by this Article," but only guaranteed "the continuance of certain incidents of trial by jury which (it) had left unmentioned." Page 39 of 317 U.S.

Prior to the adoption of the Constitution, soldiers were tried by jury at common law when accused of non-military, off base offenses. Quirin held that the object of Section 2 Article III was to "preserve, unimpaired, trial by jury in all those cases in which it had been recognized by the common law." Page 39 of 317 U.S. If the above construction of the exception in the Fifth Amendment is correct, then they have that right today. The conclusion can only be a member of the armed forces who commits a civil crime while off duty and away from his base may not constitutionally be tried for the substantive crime by a court-martial.[1]

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[1] For a more detail analysis and study see appended hereto—Extract from the testimony of A. Kenneth Pye, Assoc. Dean & Professor of Law given to the Committee On The Judiciary, U.S. Senate, 87th Congress, 2nd Sess. on Constitutional Rights Of Military Personnel recorded on pp. 571-72 of the Committee's report; Vand. Law Review: The Constitution and the Standing Army: Another problem of Courts-martial Jurisdiction; Harv. Law Review: Courts-Martial & The Bill of Rights, The Original Understanding; and The Original Practice II; Memo of Understanding Between the Departments of Defense and Justice respecting civil substantive crimes; Ex parte [illegible]ey, 82 F. Supp. 743; Extract Charles v. U.S. Territorial Gov[illegible]ment; Captain Klein U.S.D.C., N.D., Calif. July 27, 1964.

VIII

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D.C. violated petitioner's Federal Constitutional Rights prohibiting self incrimination and more specifically those Federal Constitutional Rights guaranteed to him by Article III and Amendment V, United States Constitution which relates to no person being compelled to be a witness against himself in the following manner:

Petitioner was initially arrested by civil police and from that point on he was questioned continually by civil and military police for approximately twenty-four hours without sleep or rest and, petitioner was not only the prime suspect but, was in fact the only suspect and the entire extra-judicial proceedings carried on at the civil Honolulu Police Station, the Hawaiian Armed Services Police Station, and the Criminal Investigator's Headquarters at Fort Shafter was designed primarily from allowing petitioner to contact his friends, relatives, or friends and to get him to confess and thereby incriminate himself. The teachings of *Escobedo* v. *Illinois* 378 U.S. 478 is broad enough to encompass a member of the armed forces who is being detained in a military police station solely for the purpose of gaining incriminating evidence, (confession) and Petitioner was not free to live by virtue of his being a prisoner. It can certainly be said with accuracy that Petitioner was the accused at this point in the proceedings and his further detention was solely for the purpose of forcing him to incriminate himself; this is equally evidenced by the unlawful coercion used (mental) on petitioner to protect "the army" . . . "the army protects it's own". The introduction of the confession at Petitioner's trial was prejudicial error of the greatest magnitude without anyone even inquiring into the circumstances surrounding it's giving.

IX

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D.C. violated petitioner's Federal Constitutional Rights to a fair and impartial

trial and more specifically those Federal Constitutional Rights guaranteed to him by Amendment VI United States Constitution which relates to be confronted by his accuser and see and hear the testimony of the witnesses face to face.

The respondent in lieu of presenting the alleged victim of these crimes decided to make use of depositions and, in accordance with the procedure of Article 49, U.C.M.J. (10 U.S.C. 849) did not inform petitioner that depositions would be used; that depositions would be taken; the time and place for taking said depositions; the despondent whose testimony would be taken by deposition; or any other information that was required by article 49 of the code. However, even absent this jurisdictional error was the fact that petitioner did not consent, and indeed at trial objected to the use of depositions in lieu of the victim of these crimes. The Sixth Amendment of the Constitution and the teachings of *Pointer* v. *Texas*, —— U.S. —— (April 5, 1965) prohibit the use of depositions in prosecution for capital or infamous crimes absent the consent of the accused being tried; the F.R.Crim.P. 41 prohibits the government itself from using depositions but only the accused. Surely the Constitution is broad enough to prohibit there use in a military trial absent necessity rather then in the present case merely for convenience. If depositions were to be used the government should have taken the depositions of the witnesses in Hawaii where Petitioner and his counsel could have been present and, then transferred the trial to California where the absent witnesses could have appeared. The use of depositions in the circumstances of the case was such a misuse of discretionary authority that it constituted jurisdictional error of the greatest magnitude.

X

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D. C. violated petitioner's Federal Constitutional Rights to a fair and impartial trial and more specifically those Federal Constitutional Rights guaranteed to him by the VI Amendment which relates to the assistance of counsel in the following manner:

Having elected to make use of depositions of the absent witnesses in petitioner's trial, the respondent maintains that they appointed two "disinterested persons" to act for the government and defendant in the taking of the absent witnesses depositions. This is certainly not the "assistance of counsel" guaranteed by the VI Amendment and as taught in *Gideon* v. *Wainwright* 372 U.S. 335. Petitioner never knew of the assignment of these "disinterested parties"; petitioner was never afforded a means of communication, written or oral, with this mysterious person; was this person an attorney; even though it may have been an attorney, can it be reasonably said that this is adequate representation. The least that would have been required under the circumstances was for the government to have provided for defendant's counsel of his own choosing whou (sic) would then defend him at trial to be present at the taking of the depositions of the most important witness of all . . . the victim. This was and is the only witness outside of petitioner who could actually testify first hand as to what actually happened at the Reef Hotel. Mere perfunctionally appearance of counsel, no matter how competent, is not sufficient to hold this as adequate representation. Petitioner was under the circumstances of the case effectively deprived of the assistance of counsel at the most crucial part of the entire proceedings . . . the cross-examination of the victim of the crime. This was and is prejudicial and jurisdictional error of the greatest magnitude and by itself should be sufficient for awarding the writ.

XI

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D. C. violated petitioner's Federal Constitutional Rights to a fair and impartial trial and more specifically those Federal Constitutional Rights guaranteed to him by Article III and Amendment V which relates to "jury" and due process of law in the following manner:

Petitioner was found guity of infamous crimes by a ⅔rds majority rather than a unanimous vote of the courts-martial which tried him. Surely even absent

everything else, a courts-martial, which replaces the jury, must vote like a jury . . . a unanimous vote for guilt. Anything else eliminates the concept of "reasonable doubt" and the "presumption of innocence". A less than unanimous vote is not binding and therefore jurisdictional error. Congress may not make any laws for the government and regulation of the land and naval forces absent that which is "necessary and proper".

WHEREFORE, Petitioner prays as follows:

1. That an order of notice be issued directing the respondents to show cause whay the writ should not be granted;
2. That a writ be granted directing respondents to produce petitioner at all hearings held by this court;
3. That after a hearing on the merits, a writ be issued directing that petitioner be discharged from further custody;
4. That the conviction and sentence of the military courts-martial be declared null and void in their entirety and petitioner be released forthwith;

Respectfully submitted

/s/ James F. O'Callahan
JAMES F. O'CALLAHAN,
Petitioner, pro se
Box PMB 1,000
Lewisburg, Pennsylvania 17837

Before me, a Parole Officer, personally appeared the above, James F. O'Callahan, who, being by me first duly sworn, says that the facts and allegations in the above petition are true as he verily believes.

JAMES F. O'CALLAHAN

Sworn and subscribed to before me in my presence this 28 day of March in the year of Our Lord 1966.

/s/ (Illegible)
Parole Officer
United States Penitentiary
Lewisburg, Pennsylvania

Parole Officer - Authorized by Act of July 7, 1955 to administer oaths (18 U.S.C. 4804).

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Habeas Corpus No. 756

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, PETITIONER

v.

JACOB J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania, and The DEPARTMENT OF THE ARMY, United States Army, Washington, D.C., RESPONDENTS

RESPONDENT'S RETURN TO RULE TO SHOW CAUSE AND ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS—
Filed May 5, 1966

Comes now the respondent, Jacob J. Parker, Warden, United States Penitentiary, Lewisburg, Pennsylvania, on whom has been served a petition for a writ of habeas corpus and a rule to show cause why such writ should not be granted, and by his attorneys makes a return to the said rule and an answer to the said petition and respectfully shows to the court that he holds the said James F. O'Callahan by authority of the United States as a prisoner pursuant to the sentence of a general court-martial under the following circumstances:

I

That the said James F. O'Callahan, while serving on active duty in the United States Army, assigned to Field Station (8605), Fort Shafter, Territory of Hawaii, in the grade of Sergeant with Army Service Number RA 11221278, was duly convicted on 11 October 1956, at Fort Shafter, Hawaii, by a general court-martial convened by the commanding general, United States Army, Pacific, of the following offenses (charges attached hereto as Respondent's Exhibit A):

a. Assault with intent to rape Miss Michaela Scholes, on 21 July 1956, in violation of Article 134, Uniform

Code of Military Justice (UCMJ) (Charges I and its specification; 10 U.S.C. 934).[1]

b. Attempt to rape Miss Michaela Scholes, on 21 July 1956, in violation of Article 80, UCMJ (Charge II and its specification; 10 U.S.C. 880).

c. Housebreaking, on 21 July 1956, by entering the apartment of Mr. Fenton Scholes with intent to commit a criminal offense therein, to wit, rape, in violation of Article 130, UCMJ (Charge III and its specification; 10 U.S.C. 930).

II

During the court-martial, the petitioner was represented by a qualified military lawyer, 1st Lieutenant Bradford W. Mitchell, a member of the Judge Advocate General's Corps and certified in accordance with Article 27(b), UCMJ (10 U.S.C. 827(b)). This officer also represented the petitioner during the formal pretrial investigation of the court-martial charges, from 27 to 30 July 1956, held pursuant to Article 32, UCMJ (10 U.S.C. 832). In connection with trial of the charges, Lieutenant Mitchell was appointed, on 2 August 1956, to defend the petitioner.

III

The court-martial sentenced the petitioner to be dishonorably discharged from the service, to forfeit all pay and allowances, and to be confined at hard labor for ten years.

IV

Under the provisions of Article 61, UCMJ (10 U.S.C. 861), the convening authority referred the record of trial (Respondent's Exhibit B) to his staff judge advocate for review. After a thorough review of the record of trial (attached hereto as Respondent's Exhibit C), the staff

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[1] The Uniform Code of Military Justice was enacted by the act of 5 May 1950, Public Law 506, 81st Congress, ch. 169, sec. 1, 64 Stat. 108; title 50, U.S.C., sec. 551-736 (1952 ed.). The Uniform Code of Military Justice was codified and reenacted into law without any change by Public Law 1028, 84th Congress, ch. 1041, 10 August 1956, 70A Stat. 36-78; 10 U.S.C. 801-940 (1958 ed.).

judge advocate submitted his written opinion thereon to the convening authority. The staff judge advocate found the findings of guilty, as to all the charges and specifications thereof, correct in law and fact, and recommended that the sentence as adjudged by the court-martial be approved.

V

On 6 November 1956, the convening authority took action upon the case under the provisions of Article 64, UCMJ (10 U.S.C. 864). He approved the findings of guilty and the sentence, and forwarded the record of trial, as required by Article 65(a), UCMJ (10 U.S.C. 865(a)); to The Judge Advocate General of the Army for review by a Board of Review. The charges, specifications, pleas, findings and sentence of the court-martial, and the approving action of the convening authority are set forth in General Court-Martial Order Number 18, Headquarters United States Army, Pacific, APO 958, San Francisco, California, dated 6 November 1956, which promulgates the results of trial and is attached hereto as Respondent's Exhibit D.

VI

The Board of Review in the Office of The Judge Advocate General of the Army reviewed the record of trial as required by the provisions of Article 66, UCMJ (10 U.S.C. 866). Pursuant to the petitioner's request (attached hereto as Respondent's Exhibit E), the petitioner was represented in all proceedings before the Board of Review by a qualified military lawyer designated by The Judge Advocate General under the provisions of Article 70(a) and (c)(1), UCMJ (10 U.S.C. 870(a) and (c)(1)). The petitioner's counsel submitted an assignment of errors (attached hereto as Respondent's Exhibit F), but waived oral argument thereon before the Board of Review. On 4 January 1957, the Board of Review found the findings of guilty and sentence correct in law and fact and affirmed them.

VII

On 14 January 1957, the petitioner filed a petition in the United States Court of Military Appeals for a grant of review pursuant to Article 67, UCMJ (10 U.S.C. 867). On 1 March 1957, the United States Court of Military Appeals denied this petition.

VIII

Thus, final military appellate review having been completed and the provisions of Article 71(c), UCMJ (10 U.S.C. 871(c)), having been complied with, the sentence was ordered into execution on 21 March 1957. A United States penitentiary, reformatory, or other such institution was designated as the place of confinement. A copy of General Court-Martial Order Number 168, Headquarters 5th Infantry Division, Fort Ord, California, dated 21 March 1957, promulgating the results of the final approving action and the order of execution of the sentence is attached as Respondent's Exhibit G.

IX

On 5 March 1958, the petitioner was transferred to the United States Penitentiary at Lewisburg, Pennsylvania. Per order of the United States Board of Parole, the petitioner was, on 6 May 1960, released from confinement and placed on parole. On 5 April 1962, while still on parole, the petitioner was convicted on his plea of guilty of a charge of rape in the Middlesex Superior Court, Commonwealth of Massachusetts, and sentenced by a Justice thereof to a term of 5 to 8 years. On 21 February 1966, the petitioner was released to the Federal authorities and reconfined, on 5 March 1966, in the United States Penitentiary at Lewisburg as a parole violator, pursuant to 18 U.S.C. 4205 (1964 ed.), to serve the remainder of his military sentence. The petitioner's full term, less 180 days, expires 28 January 1972; with statutory good time it should expire on 16 June 1970. Attached hereto as Respondent's Exhibits H, I, and J are, respectively, the Sentence Data Record of the Bureau of Prisons, dated 9 March 1966, Referral for Consideration of

Alleged Violation, dated 13 March 1962, and the Parole Violator Warrant, dated 13 March 1962, with Deputy U. S. Marshal's Return.

X

Answering the allegations in the petition for a writ of habeas corpus, the respondent admits the allegations contained in the petition which are consistent with the facts stated in this return and denies the remaining allegations in the petition.

XI

Further answering, the respondent avers:

a. That the petitioner was serving as a soldier in the United States Army, in the grade of Sergeant, at the time he committed the offenses on 21 July 1956 and at the time of trial by general court-martial on 11 October 1956. He was, therefore, subject to the jurisdiction of the United States Army.

b. That the general court-martial which tried the petitioner was properly constituted, had jurisdiction over the petitioner and of the offenses charged against him, and that the sentence adjudged against the petitioner by the court-martial was within legal limits and within the power of the court-martial to adjudge.

c. That the fact that the offenses were committed off a military reservation and during a period when the petitioner was not required to perform any official military duties, did not in any way affect the jurisdiction of the court-martial over the person of the petitioner or over the offenses.

d. That, as the petitioner was a soldier in the United States Army at the time of the offenses and at the time of his trial by court-martial, he was not entitled to a trial by jury or to a unanimous guilty verdict.

e. That the petitioner was not illegally coerced into making a pretrial confession. The record of trial of the petitioner's case and the subsequent appellate procedures on his behalf are completely devoid of any matter to substantiate any such contentions. Prior to making his pre-

trial statement, the petitioner was properly warned of his rights by the military criminal investigator as required by Article 31, UCMJ (10 U.S.C. 831). That fact is also established by the petitioner's affirmative acknowledgment in the pretrial written statement that he was informed of the nature of the accusations and of his rights under Article 31 and that the statement is of his free will, without threat of punishment, coercion, unlawful influence or inducement.

f. That the Interrogatories and Depositions (Prosecution Exhibits 1, 2, 3, and 4) were caused to be taken, and in fact taken, after the charges against the petitioner had been signed and after these charges had been referred for trial. That the then trial counsel, Captain Shelton R. Nelson, had submitted the written interrogatories to the petitioner's counsel and gave him ample opportunity to propound cross-interrogatories; that counsel declined to propound cross-interrogatories and objected to the taking of the depositions. That at the time of trial the witnesses who testified by the depositions in question resided beyond the Territory of Hawaii and more than 100 miles from the place of trial. Accordingly, the depositions were properly admitted into evidence and considered by the court-martial.

g. That the petitioner is properly confined in accordance with the law applicable to his case.

WHEREFORE, for the reasons hereinbefore set forth the respondent respectfully prays the court to discharge the rule to show cause and to dismiss the petition for the said writ of habeas corpus.

BERNARD J. BROWN
United States Attorney

/s/ Harry A. Nagle, Jr.
Assistant United States Attorney

/s/ Abraham Nemrow
Lieutenant Colonel, JAGC
Office of The Judge Advocate General
Department of the Army
Washington, D.C.

/s/ Bruce E. Stevenson
Major, JAGC
Office of The Judge Advocate General
Department of the Army
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Habeas Corpus No. 756

JAMES F. O'CALLAHAN, PETITIONER

vs.

WARDEN JACOB J. PARKER, United States Penitentiary, Lewisburg, Pennsylvania, and The DEPARTMENT OF THE ARMY, United States Army, Washington, D.C., RESPONDENTS

PETITIONER'S TRAVERSE TO RESPONDENTS' ANSWERS TO RULE TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED; AND MOTION FOR ASSIGNMENT OF COUNSEL —Dated May 13, 1966 and Filed May 19, 1966

Now comes James F. O'Callahan, Petitioner, *pro se*, and says:

Petitioner denies each and every allegation and answers of the respondents in their answers to rule to show cause.

Petitioner being a layman and acting *pro se* duly motions this honorable court for assignment of counsel in the above entitled cause of action now pending before this court. Petitioner verily believes that due to the voluminous papers and answers filed by the respondents and the questions of waiver of rights, constitutional retroactivity of legal decisions, trial objections not specifically stating the word "confrontation", government appellate review, etc., petitioner is not able to adequately and intelligently express his answers in writing in this traverse and the guiding hand of competent counsel is of paramount importance to insure a fair and just hearing in the cause of action pending.

WHEREFORE, petitioner duly prays for the granting of his motion for counsel or in the alternative that this court hold a swift and speedy hearing and during oral arguments by petitioner the court question petitioner for any points of clarification needed.

Respectfully submitted

/s/ James F. O'Callahan
JAMES F. O'CALLAHAN
Petitioner, pro se
Box PMB 1,000
Lewisburg, Pennsylvania

[Certificate of Service (omitted in printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Habeas Corpus No. 756

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, PETITIONER

vs.

JACOB J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania, and The DEPARTMENT OF THE ARMY, United States Army, Washington, D.C., RESPONDENTS

APPEARANCES:

For the Petitioner—Pro Se

For the Respondents—BERNARD J. BROWN, United States Attorney; HARRY A. NAGLE, JR., Assistant United States Attorney; ABRAHAM NEMROW, Lieutenant Colonel, JAGC, Office of The Judge Advocate General Department of the Army, Washington, D.C.; BRUCE E. STEVENSON, Major, JAGC, Office of The Judge Advocate General, Department of the Army, Washington, D.C.

* * * * *

MEMORANDUM—Dated & Filed August 12, 1966

James F. O'Callahan, a prisoner at the United States Penitentiary, Lewisburg, Pennsylvania, has filed a petition for a writ of habeas corpus in this Court. On October 11, 1956, O'Callahan was convicted of assault with intent to commit rape, attempted rape, and housebreaking with intent to commit rape, in violation of 10 U.S.C. §§ 934, 880, 930, by a general court-martial at Fort Shafter, Hawaii. O'Callahan was then serving on active duty in the United States Army, although the offenses were committed while he was off duty and off base.

The allegations in the complaint are as follows: The acts for which O'Callahan was convicted occurred on July 20, 1956, in the Reef Hotel. He was arrested that night

by the Honolulu Police Department, and was interrogated by them until he was turned over to the Hawaiian Armed Services Police who also questioned him. He was subsequently turned over to the United States Army. The Army investigators allegedly told O'Callahan that if he gave a confession it would not result in any military charges and it would not affect his career. O'Callahan confessed and was subsequently served with the charges against him and was assigned counsel.

O'Callahan was subsequently tried and convicted by a general court-martial by a two-thirds vote. At the trial, the confession was introduced. Interrogatories of the victim were introduced over objection. The interrogatories were taken in accordance with 10 U.S.C. § 849, and the victim, herself, never testified at the trial.

O'Callahan contends that his custody is unlawful on the following grounds: (1) That the court-martial had no jurisdiction, because the alleged acts were committed off-base while he was off-duty, under Article III, Section 2 and the Fifth and Sixth Amendments to the United States Constitution; (2) That his confession was coerced; (3) That depositions of the victim and certain other witnesses were improperly introduced into evidence and (4) That he was denied his right to trial by jury and his right to a unanimous guilty verdict under Article III and the Fifth Amendment to the United States Constitution.

In this case, a Rule to Show Cause issued, the Respondents filed an Answer and a supporting Memorandum, and Petitioner filed a Traverse and a motion for assignment of counsel. The Respondents filed with their Answer certified copies of certain sentence and parole records, the Record of Trial, and certain other documents relating to the court-martial. In their Answer, Respondents made a motion to dismiss the petition and it is this motion which is before this Court at this time.

The scope of review of military cases on habeas corpus was succintly stated in Palomera v. Taylor, 344 F.2d 937, 938-939 (10th Cir. 1965), as follows:

> "While the civil courts are authorized to review a military conviction on habeas corpus, that review has generally been limited to determine whether the

court-martial had jurisdiction of the person accused and the offense charged and whether it acted within its lawful powers. Hiatt v. Brown, 339 U.S. 103, 70 S.Ct. 495, 94 L.Ed. 691 (1950). This review has also been held to include an examination of the accused's Constitutional rights but only to see that the military courts have given due consideration to the guarantees afforded by the Constitution. Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953); Easley v. Hunter, 209 F.2d 483 (10th Cir., 1953); Suttles v. Davis, 215 F.2d 760 (10th Cir., 1954)."

The first issue is whether the court-martial had jurisdiction over petitioner. O'Callahan raised this same ground in a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts. O'Callahan v. Chief U.S. Marshall and Dept. of Army, Misc.Civil 66-8-W (1966). In his opinion, dated February 23, 1966, Chief Judge Wyzanski held that there was no merit in the petitioner's position and that the court-martial had jurisdiction over the petitioner. The petition for writ of habeas corpus was denied. This issue and the grounds asserted are the same here, and any further inquiry will not serve the ends of justice. Thus, under 28 U.S.C. § 2244, this Court will not entertain the petition on this issue. United States ex rel. Richter v. Rundle, 227 F.Supp. 847 (E.D.Pa. 1964).

The second allegation is that the confession was coerced. In his petition, O'Callahan cites the Escobedo case. However, both the rules of the Escobedo and the Miranda cases have been declared to be of prospective application only. Johnson v. State of New Jersey, 34 L.W. 4592 (1966). The Record of Trial shows that O'Callahan and his counsel were advised of the right to testify and contest the voluntariness of the confession. Petitioner indicated that he understood his rights and when the statement and a drawing were offered into evidence, no objection was made. (Record of Trial, pp. 41, 42). This was a clear election not to contest the voluntariness of the confession and the drawing. This issue was not raised in

his military appeals either. The allegation is without merit since the due process requirements have been satisfied. Swisher v. United States, 354 F.2d 472, 476 (8th Cir. 1966).

The third allegation is that certain depositions were improperly introduced into evidence at the trial. Keeping in mind the scope of review, this Court will consider whether the military courts gave due consideration to O'Callahan's constitutional rights.

At the trial, the prosecution offered into evidence written interrogatories of the victim and three other witnesses who were then in the continental United States. (Record of Trial, pp. 17, 18). They were admitted into evidence over the objections of O'Callahan's counsel. When O'Callahan's counsel first objected, he stated that there was no showing that the witness was unavailable nor that it was unreasonable to have the witness present and that the accused had a right to be confronted by the witnesses against him. (Record of Trial, p. 17). The subsequent argument stressed the lack of showing of the unavailability and unreasonableness factors. (Record of Trial, pp. 18-21). However, it cannot be said that the confrontation objection was dropped.[1] The record further indicates that the defendant was offered the right to submit cross-interrogatories, but objected to the procedure on the same ground as raised at trial. (Record of Trial, p. 19).

In United States v. Jacoby, 29 C.M.R. 244 (1960), the Court of Military Appeals overruled United States v. Sutton, 11 C.M.R. 220, and United States v. Parrish, 22 C.M.R. 127, holding that under the Sixth Amendment an accused must be afforded the opportunity to be present with counsel at the taking of written depositions. In Jacoby, accused's counsel objected to the taking of depositions upon written interrogatories on the basis that the accused would be denied her right to confrontation of the witnesses against her and made the same objection at trial. Both objections were overruled at the trial. On

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[1] On page 19 of the Record of Trial, O'Callahan's counsel cited U.S. v. Valli, 21 C.M.R. 186 (1956), stating th t he relied on the language therein. The right of confrontation is discussed therein.

appeal, the Court of Military Appeals reversed the conviction. Three weeks later, in United States v. Lawrence, 29 C.M.R. 320 (1960), the Court of Military Appeals reversed a similar case involving written interrogatories that were objected to as denying the right of confrontation, citing the Jacoby case. Also See United States v. Weinstein, 29 C.M.R. 415 (1960).

However, it cannot be said that the objections raised by O'Callahan's counsel were not considered by the military courts. Under the circumstances, it appears that the objections were given due consideration and our review will go no further. Swisher v. United States, 237 F.Supp. 921, 924-929 (W.D.Mo. 1965); affirmed in 354 F.2d 472 (8th Cir. 1966). It appears from the record that the military has given fair consideration to the petitioner's claim, thus it is not the federal court's function to grant the writ to re-evaluate the evidence. Sunday v. Madigan, 301 F.2d 871, 873 (9th Cir. 1962).

The final claim by O'Callahan is that he was convicted by a two-thirds vote rather than by unanimity and that he did not have a jury trial in violation of his constitutional rights. In Whelchel v. McDonald, 340 U.S. 122, 127 (1950), it is stated that: "The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions." Petitioner was in the United States Army at the time of the trial and he was not entitled to either a unanimous guilty verdict nor a trial by jury. There are no deprivations of any constitutional rights in this regard.

Accordingly, the petition for writ of habeas corpus will be dismissed and the motion of the Respondents will be granted.

/s/ Frederick V. Follmer
United States District Judge

August 12, 1966.

ORDER

NOW, August 12, 1966, in accordance with Memorandum filed this day, It is hereby Ordered that the motion of the Respondents, Jacob J. Parker and The Department of the Army, to dismiss the petition of James F. O'Callahan for writ of habeas corpus is granted, that the petition for writ of habeas corpus is dismissed, and that the motion for assignment of counsel is denied.

/s/ Frederick V. Follmer
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16210 and 16211

JAMES F. O'CALLAHAN, APPELLANT

v.

J. J. PARKER, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG PENNSYLVANIA, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Submitted January 17, 1967

Before: HASTIE, GANEY and SEITZ, *Circuit Judges.*

OPINION OF THE COURT—Filed February 2, 1967

PER CURIAM:

The issues which we are asked to decide on this appeal from a denial of habeas corpus are now before the United States Court of Military Appeals on a "motion for rehearing" filed in that court by the present appellant on December 6, 1966, and the Court of Military Appeals has directed that the matter be briefed and argued. In this posture of the matter any intervention by the civil courts would be untimely.

Accordingly, the district court's denial of habeas corpus will be affirmed.

A True Copy:

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,211

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, APPELLANT

vs.

J. J. PARKER Warden, United States Penitentiary, Lewisburg, Pennsylvania and the DEPARTMENT OF THE ARMY, United States Army, Washington, D. C.

(D. C. Habeas Corpus No. 756)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: HASTIE, GANEY and SEITZ, *Circuit Judges.*

JUDGMENT—Dated and Filed February 2, 1967

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 12, 1966, be, and the same is hereby affirmed.

ATTEST:

/s/ Thomas F. Quinn
Clerk

February 2, 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16210 and 16211

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, APPELLANT

v.

J. J. PARKER, WARDEN, UNITED STATES PENITENTIARY,
LEWISBURG, PENNSYLVANIA

AND THE

DEPARTMENT OF THE ARMY, UNITED STATES ARMY,
WASHINGTON, D. C.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Reargued January 11, 1968

Before: HASTIE, *Chief Judge;* and GANEY and
SEITZ, *Circuit Judges.*

OPINION OF THE COURT—Dated and Filed March 8, 1968

By HASTIE, *Chief Judge.*

The petitioner in this habeas corpus proceeding was a soldier in the United States Army when a court-martial convicted him of the crimes of housebreaking and assault with intent to commit rape and imposed a ten year sentence which he is now serving.

After his sentence had become final he attacked it collaterally by petition in the nature of error coram nobis in the United States Court of Military Appeals. That court accepted the petition as within its jurisdiction, considered the allegations on their merits and denied relief.

United States v. *O'Callahan*, 1967, 16 U. S. M. A. 568, 37 C. M. R. 188.

The present petition for habeas corpus was filed in the District Court for the Middle District of Pennsylvania, the district within which the prisoner is now confined. Denial of the petition was followed by this appeal.

Upon first argument we declined to consider the merits of the appeal because a petition for reconsideration of certain relevant issues was pending before the Court of Military Appeals. However, after that court denied the requested reconsideration, we agreed to consider and decide the merits of the appeal and we now do so.

Before the Court of Military Appeals the prisoner urged that his conviction had been obtained through violation of his Sixth Amendment right to confrontation of the witnesses against him. He has reasserted that contention in the present proceeding.

For many years courts-martial permitted the prosecution to introduce into evidence sworn answers which absent and not conveniently available witness had given to written interrogatories. Article 49, Uniform Code of Military Justice, 10 U. S. C. 849. The defense was permitted to have cross-interrogatories submitted to and answered by such witnesses along with the prosecution's questions. However, no provision was made in this case for depositions taken by way of direct and cross-examination by opposing counsel.

The alleged assault which gave rise to this prosecution occurred in a hotel room in Hawaii. The alleged victim, a fourteen year old girl, was a tourist from California. Three New Yorkers, also hotel guests, were among the witnesses. The testimony of these four persons was obtained in the form of sworn answers to interrogatories given after they had returned home. Defense counsel, advised of the contemplated interrogatories and his right to submit cross-interrogatories, objected to that procedure and asked for the right to cross-examine the witnesses. This request was denied and the defense then refused to submit cross-interrogatories. Subsequently, the answers of the four witnesses to interrogatories were read into evidence at the petitioner's trial over the objection of defense counsel.

In a subsequent and unrelated case, tried after the petitioner's conviction had become final, the Court of Military Appeals decided that its past rulings sanctioning the use of sworn answers to interrogatories as evidence in military trials had been mistaken and that the testimony of an absent witness must be taken by deposition with attendant opportunity afforded defense counsel to cross-examine the deponent. *United States* v. *Jacoby*, 1960, 11 U. S. C. M. A. 428, 29 C. M. R. 244. Therefore, in his post conviction petition to the Court of Military Appeals, the petitioner sought to have his conviction set aside because he had been denied the right of confrontation which the court had subsequently recognized in the *Jacoby* case. The court refused to set aside the conviction on the ground that, apart from the answers to interrogatories, the evidence of guilt was overwhelming and undisputed and, therefore, the introduction of the additional incompetent evidence was merely cumulative and not prejudicial.

We have to decide, first, whether the record justifies the factual conclusion that the accused was not prejudiced and, second, whether the use of the evidence in question was such a deprivation of Constitutional right as requires redress by a federal civil court on habeas corpus, whatever may appear concerning prejudice or lack of prejudice.

At the petitioner's trial several witnesses testified in open court to essential elements of the alleged crimes. Charles Redden, a soldier who had been a friend and companion of the petitioner, testified that on the evening in question, after they had drunk several beers, he and the petitioner made their way to the balcony outside of the fourth story hotel room where the intrusion and assault allegedly occurred. Looking in they saw a girl in bed. The defendant suggested that they enter the room and that one of them should have intercourse with the girl while the other held her. Redden rejected the suggestion, warned the defendant that such conduct would be rape and left the scene. He returned to the car in which they had come to the hotel and waited a short time for the petitioner who did not return.

Herman Olivieri, the hotel security officer, testified that, informed of screams from upstairs he had gone outside the building and had seen the petitioner climbing down the exterior of the hotel from balcony to balcony. He gave chase and apprehended the defendant a short distance away. He testified that the petitioner was dressed in trousers and a T-shirt, that his belt was loose and his trousers open. He took the defendant to the room of the girl who allegedly had been assaulted and there observed injuries to the girl's face and arms which he described to the court. He also testified that the defendant admitted that a shirt found at the scene belonged to him and that he had entered the room and there had been a "scuffle" between him and the girl.

In addition, a confession made by the defendant to the military police was read into the record at the trial without objection after evidence of voluntariness. In this statement, the defendant admitted entering the hotel room and striking the girl and that his intent was rape. He also stated that he and Redden had drunk more beer than had been admitted by Redden. He described the girl as appearing to be about 18, although the victim's deposition showed her age to have been 14.

We turn now to the answers of the assaulted girl and the other hotel guests to interrogatories which were admitted over objection that the defendant had had no opportunity to confront or cross-examine the deponents. The girl's statement described her injuries more vividly than did the hotel security officer's testimony and added that her age was 14. She also confirmed the defendant's admission that he had said that he had a knife and would kill her if she should move. Otherwise she added nothing to the testimony given in open court.

The other deponents stated in their answers to interrogatories that they had heard screams and had seen a man climbing down the side of the building. They also described the girl's injuries.

The defense offered no testimony tending to disprove any essential element of the prosecution's case. Instead, after the court-martial had found the petitioner guilty as charged, the defense sought to show that the petitioner

had been a superior and well-behaved soldier and that this episode was an aberrant and irrational departure from his otherwise consistent good conduct. The court then sentenced the petitioner to a dishonorable discharge and to ten years at hard labor. A maximum sentence of twenty-five years would have been permissible.

Our study of the record satisfies us that the Court of Military Appeals was justified in its conclusion that the accused was not prejudiced by the answers of the absent witnesses to interrogatories. No rational trier of fact could have acquitted the accused in the light of the above outlined undisputed testimony of witnesses in open court and the confession of the accused. Thus, even if the use of the answers to interrogatories was inconsistent with the mandate of the Sixth Amendment,[1] the error was harmless in this case.

The Supreme Court has recently considered the significance of the absence of prejudicial consequence where error is of Constitutional dimension. *Chapman* v. *California*, 1967, 386 U. S. 18, applying the doctrine of *Fahy* v. *Connecticut*, 1963, 375 U. S. 85. In the *Chapman* case, the Court stated that when a conviction is attacked collaterally, the use of Constitutionally inadmissible evidence may be treated as harmless error, but only if the prosecution shall prove to the federal court "beyond reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U. S. at 24.

This rule was announced in a case involving a state conviction. Certainly, no stricter rule applies to the use of evidence by a military court. See *Burns* v. *Wilson*, 1953, 346 U. S. 137. Applying the *Chapman* doctrine here we find, as did the Court of Military Appeals, that beyond reasonable doubt the answers to interrogatories did not affect the verdict of guilty in this case. Moreover, the sentence indicates that the court gave substantial effect to the matter submitted on behalf of the petitioner

[1] For purposes of this appeal we assume that the use of the interrogatories was inconsistent with *Pointer* v. *Texas*, 1965, 380 U.S. 400, and that *Burns* v. *Wilson*, 1953, 346 U.S. 137, permits a federal civil court to reach the merits of this issue when a military conviction is attacked by habeas corpus.

in mitigation. Accordingly, the use of the answer to interrogatories as evidence, even if Constitutionally impermissible, did not constitute reversible error in the light of the entire record.

The petitioner also makes belated claims that he did not have effective assistance of counsel and that Constitutional requirements were not met in the obtaining of his confession. These contentions have not been urged before the Military Court of Appeals or any other military tribunal. Without suggesting that they have merit, we decide merely that they are not ripe for consideration by way of collateral attack in a civil court.

Finally, petitioner's counsel has ably briefed a detailed and well-documented argument to support the proposition that the military courts lack jurisdiction over such a crime as is charged in this case when the offense occurs, as it did here, while the accused soldier is on leave away from the military reservation. We considered and ruled against an indistinguishable claim of lack of military jurisdiction in *Thompson* v. *Willingham*, 1963, 318 F.2d 657. We adhere to that holding.

The judgment will be affirmed.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,211

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, APPELLANT

vs.

J. J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania and the DEPARTMENT OF THE ARMY, United States Army, Washington, D. C.

(D. C. Habeas Corpus No. 756)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: HASTIE, *Chief Judge*, and GANEY and SEITZ, *Circuit Judges*.

JUDGMENT—Dated and Filed March 8, 1968

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 12, 1966, be, and the same is hereby affirmed.

March 8, 1968

* * * *

SUPREME COURT OF THE UNITED STATES

No. 202 Misc., October Term, 1968

JAMES F. O'CALLAHAN, PETITIONER

v.

J. J. PARKER, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 14, 1968

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the first question presented by the petition which reads as follows:

"1. Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?"

The case is transferred to the appellate docket as No. 646 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 325805 322